Canadian federalism and the autonomy of Québec : A historical viewpoint:

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The author of this study proposes an interpretation of Québec's constitutional history and an overview of its key demands for reform.

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Introduction

The referendum of October 30, 1995 suddenly revealed to the world a federation in crisis and a people over seven million strong that nearly chose sovereignty. The close outcome of the vote surprised many foreign observers who, after the failure of the May 1980 referendum on sovereignty-association, had not expected such a strong revival of national feeling in Québec. Others were astonished that a prosperous, democratic and modern country like Canada had been so close to breaking up. That a province by the vote of its population could break the federal bond was both fascinating and problematic.

As he had promised during the referendum campaign, the federal Prime Minister Jean Chrétien tried to respond to the Québec population's dissatisfaction with Canadian federalism. In November 1995, his government tabled a resolution in the House of Commons recognizing Québec as a distinct society, a bill « lending » five regions of the country, including Québec, a veto over constitutional reform and a bill reforming unemployment insurance, making it possible, among other things, for the federal government to entrust the provinces with managing funds earmarked for training the unemployed. Generous as they may have seemed, these « offers » met with little enthusiasm in Québec. On the contrary. They were deemed to be without real consequence and unacceptable, far less than Québec's « traditional demands »[1].

The Canadian federation met with criticism from the time it was created in 1867. Québec was the first to call for reforming the constitution and Canadian institutions. Of all the agents of change, Québec has been the most important by far, although the Aboriginal peoples and the other provinces in turn have demanded the reform of certain aspects of Canadian federalism. While the provinces have made

demands targeting the Senate and government responsibilities, Québec has been alone in calling for the comprehensive renewal of the federal system, even the right to withdraw from it.

Since the late 1960s, a growing number of Quebecers have reached the conclusion that the Canadian constitution no longer guarantees Québec either the means by which to develop or the protection of its identity or place as a founding people. Faced with these facts, some have concluded that Québec's only option is to become a sovereign country. This disaffection to Canadian federalism was expressed in May 1980 in the referendum on sovereignty-association, then, in a higher proportion, in the referendum of October 1995. Other Quebecers, aware of some of the gaps in their federation, have remained attached to it, both for its values and its system of government. The benefits Quebecers gained from being part of Canada justified maintaining the federal tie, although Québec should enjoy greater autonomy within it.

What are commonly called Québec's « traditional claims » in Canadian political language consist of all the demands for reforming federalism Québec governments and political parties have called for. Set out formally in political programs, memoranda, white papers, bills and resolutions of the Québec National Assembly, or informally when representatives of the federal government and the provinces meet, these demands for reform have grown into a body of ideas[2]. They do not form a monolithic doctrine. They have evolved with the electoral cycle which renews the will of the people and governments. Their perspective has changed considerably over the decades. The demands of the government of Maurice Duplessis (1936-39, 1944-59), a great defender of provincial autonomy, reflect an era when the Québec State limited its actions and was concerned with preserving the Roman Catholic and traditional character of Québec society. The demands of the Lesage government (1960-66) and then of the Johnson government (1966-68), on the other hand, sprang from their will to build a modern State in Québec, assisted by a competent and independent public service, that would provide a full range of public services to the population.

Varied as they may be, these demands all aimed at preserving and strengthening Québec's autonomy within the Canadian federation. Autonomy in this context means the possibility the provinces have to fully exercise their powers as of right without having to ask for the federal government's prior consent, and to count on adequate fiscal means. This principle of autonomy has a corollary: that in certain areas of responsibility, the provinces are the sole authorities with power to legislate and act, excluding the federal government and its institutions.

Understanding Québec's adherence to the principle of autonomy means grasping the fact that the people of Québec have come to think of their government as a true national government, not simply a local government administering a territorial community. This phenomenon became apparent with the advent of the Quiet Revolution in the early 1960s, the period in Québec's social and political history when its institutions were modernized and its mores changed rapidly. The role of the Québec government expanded, breaking out of the narrow confines previous governments had set, jealously defending their powers without really exercising them. From that time on, the government set up a modern infrastructure of public services, notably in the areas of health and education, and stimulated the economy with its budgetary policies and policies on supporting employment and business. Representing a national community distinct because of its language and culture, a minority in North America but a majority on its territory, it began to promote Québec culture and ensure Québec's presence abroad.

A. The autonomy of a minority people in a unitary federation[3]

1. A precarious autonomy from the conquest of 1760 to the creation of Canada in 1867

One cannot understand contemporary Québec without looking at the period preceding the creation of Canada in 1867. It must be kept in mind that Québec as we know it today had no political existence before 1867. After the British Crown conquered New France in 1760, the French colony became a British possession, forming the « Province of Québec » in 1763. The province was under imperial administration from 1763 to 1791. In 1774, the colony's French subjects, who had lived entirely under the system of English laws since the conquest, obtained from London the right to live under the rule of their French laws and customs with respect to property and civil law. In 1791, at the request of some 10 000 British colonists who wanted to separate from the majority of some 150 000 Canadiens, the imperial power divided the colony in two, Lower Canada and Upper Canada, and endowed each new colony with a local parliament overseen by a governor appointed by London[4]. This system of government, which concentrated real power in an oligarchical legislative council, left little control to the colonial parliaments.

Troubled by the influence London had on the administration of the two colonies, the elected officials of Upper and Lower Canada called in the 1830s for the establishment of responsible government[5]. Supported by the Canadiens, some Irish settlers and English democrats[6], the Patriote party led by Louis-Joseph Papineau made itself Lower Canada's advocate for a true constitutional government that was responsible and had the people's confidence. These demands fell on London's deaf ear in 1837; Westminster, which had supported the principle of nationalities in Greece and elsewhere in Europe in 1830, did not see fit to apply the principle to its North American colonies[7]. London's refusal to respond and its decision to allow the governor to use colonial revenues without the Assembly's approval gave rise to an armed rebellion by the Patriotes in Lower Canada in 1837-38[8]. Another rebellion was staged in Upper Canada. Imperial forces suppressed the uprisings and ordered the dissolution of the parliamentary Assembly of Lower Canada in 1838.

Following the recommendation of Lord Durham, its observer sent on the scene, London merged the two colonies in order to make the population of French ancestry a minority and foster its assimilation. At the time of union, Lower Canada's population was 650 000 while Upper Canada's was only 450 000. Imposing equal representation in the elected chamber on the two colonies put Lower Canada's population at a disadvantage, while Upper Canada's population, which had grown with the immigration of Loyalists fleeing the United States and colonists from the British Isles, was able to count on a new wave of immigration to move from a fictitious equality to a real majority. The Province of Canada thus came into being in 1840. But the merger imposed by imperial power soon began to erode. Beginning in 1848, French recovered some of its rights in institutions[9]; the integrated legislative union was put in question several times; the sole executive tended to be headed by two representatives.

2. The creation of Canada in 1867: a quasi-federation sealing in Québec's mind a pact between two founding peoples

In the early 1860s, the English colonies north of the 45th parallel — the Province of Canada, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland — planned to form a political union. Talks began and several interparliamentary conferences were held in several colonies. In the Province of Canada, two coalitions, one led by John A. Macdonald, the other by George-Étienne Cartier, differed on the form of the new government. John A. Macdonald's party favoured a strong central government, even a unitary system. George-Étienne Cartier's group, more sensitive to the aspirations of the population of French ancestry, backed a federal formula. Federalism for this population and its representatives stood for a unique opportunity to recover the autonomy lost in 1840 and to give the population of the former Lower Canada its own representative institutions. Thus the former Lower Canada's 847000 French Canadians, who comprised barely one-third of the population of the new federation, saw the Canada of 1867 as « a constitutional pact that would enable them to affirm themselves as a distinct people on an equal footing with the English-speaking majority. »[10] Responding to the requests of the parliaments of the Province of Canada, New Brunswick and Nova Scotia, Westminster in 1867 created the « Dominion of Canada », comprised of one central government and four provinces, one of which was Québec.

The compromise Westminster chose was unlike any other federal experiment known at the time. It was not similar to American federalism, which grew from a confederation of independent States into a federalism distinguished by a highly compartmentalized separation of powers. The constituents of 1867 tried to reconcile British parliamentarianism with a formula of government that divided State authority. The country that took shape in 1867 was still a colony, not yet exercising all of the functions of sovereignty. It was a constitutional monarchy that was new to the experience of responsible government.

The system designed in 1867 was not an authentic federation in that it was far from entrenching in the constitution the autonomy of the provinces and their participation in decisions made at the federal level[11]. The constitutional text of 1867 contained a number of imbalances, some of its provisions giving the federal government the powers and status of a unitary government[12]. The provinces had their own jurisdictions with respect to specific matters, granted by the Constitution and not delegated by the federal government. But they did not have residual jurisdiction, that is, jurisdiction in principle over matters not attributed to an order of government[13]. The federal government could disallow the provinces' laws and their decisions, thanks to an array of unilateral powers. It could also expand its jurisdictions by a unilateral declaration of the federal parliament. Moreover, the provinces were neither represented in the upper chamber by delegates of their assemblies or by elected senators nor did they participate in appointing the principal magistrates of the central State, such as federal judges. The federal parliament, in addition to having numerous recognized jurisdictions, enjoyed broad general powers such as the power to legislate on peace, order and good government and to make laws on trade and commerce. Few jurisdictions were shared, except immigration and agriculture, subject to the preponderance of federal laws. The federal government that emerged from the Constitution of 1867 resembled a unitary government, in no way hindered by the action of provinces and their participation in its choices. In short, it was a narrow and frail autonomy that the Constitution of 1867 recognized for the unsettled community that was once again called Québec.

Canada had no sooner been created than it was clear how greatly its founders' perspectives on the compromise of 1867 differed. For George-Étienne Cartier and his successors, the compromise of 1867 was supposed to have sealed a pact between two nations, a bilateral agreement between two « founding peoples »[14] who, recognized by right as equal, chose federalism so they might live better

together. The French-Canadian nation was given the means of preserving its institutions, its laws and its own character. For John A. Macdonald, who became Prime Minister of the central government, Canada formed a Dominion headed by a strong central government holding comprehensive powers and representativeness. In the country's first thirty years of existence, the federal government did not hesitate to use its power to disallow provincial laws, considering itself a judicial authority fit to judge their constitutionality[15]. In 1887, the Premier of Québec organized a First Ministers conference to which he invited Prime Minister Macdonald. The latter refused to attend on the grounds that the provinces' sole legitimate representatives were the members of the federal parliament[16]. Prime Minister Macdonald's reaction introduced an authoritarian and centralized concept of federalism which would prevail in the following decades, and over which the government of Québec, drawing its inspiration from a classic and binational concept of federalism, stumbled time and again.

B. Québec's demands: forging a Québec national government to meet the needs of an open, pluralistic and modern society

Québec's demands before the 1960s focused mainly on defending provincial autonomy, which linked State non-interventionism with the protection of Québec's traditional character. The Catholic church, guardian of Québec civil society, saw to protecting a people long isolated from modern ideas. Conservatism and defensive nationalism dominated Québec politics. It was more common at the time to speak of a French-Canadian society than of a Québec society or people.

1. The common denominator of these demands since 1960

The autonomist discourse was revived with the election of the Lesage government in 1960. This government put the emphasis on modernizing Québec and having the Québec State take charge of responsibilities that had been in the hands of the Church or other intermediary bodies. The constraints of federalism lay more heavily on Québec from then on. The few jurisdictions and fiscal resources actually left to the provinces led Québec to call for a thorough reform of federation.

Québec's new demands covered its status within Canada, renewing the division of jurisdictions and federal institutions, protecting individual rights and the procedure for amending the Canadian Constitution[17]. The aim of these demands for the Québec government was not simply increasing its influence and responsibilities. It was first necessary to meet the needs of a society that aspired to modernity, a society increasingly pluralistic in terms of its values and demographic composition. Hence the urgency of putting the mechanisms of a modern welfare state in place and making a clearer separation between Church and State, a State able to offer its population integrated social and economic policies.

Québec governments came to play the role of a truly national government which, because of the population's confidence in it and their expectations, represented a distinct national community. One after another these governments demanded that Québec have equal status with the rest of Canada, the

status of a distinct society, even of an associated sovereign people. No government was reconciled to the idea that Québec was simply a territorial collectivity on a formal equal footing with the nine other provinces. None felt that strengthening the language rights of francophones in federal institutions and granting rights to education in French to francophone minorities outside Québec would adequately dispose of Québec's traditional demands.

The substance of Québec's demands varied greatly from the election of Jean Lesage's government in 1960 to the referendum of October 30, 1995. Parties as different as the Québec Liberal Party, the Union Nationale and the Parti Québécois — federalist, sovereignist, conservative, social-democratic and centrist parties — expressed these demands. Some of the key ideas of Québec constitutional thinking can nevertheless be summarized.

This thinking is based first of all on a demand for recognition, namely for adequation between the discourse and operation of Canadian federalism and Québec's political reality. It is a question of having the rest of Canada recognize the presence in Québec of a distinct political community that existed before the creation of Canada in 1867 and that has preserved the features of a living national community across time. Then, to obtain the recognition that this national community is legitimately represented by its provincial government, which expresses its aspirations and satisfies collective needs. As such, the Québec government has the responsibility of representing this community within the federal system and ensuring the community's cohesion and the economic and social conditions necessary for its development.

It follows from this two-fold recognition that Québec forms a fundamental political community that is entitled to decide freely on its future, that is, to decide on any change in its political status. As a founding people of Canada and a partner in the Canadian federal system, Québec has a veto over any constitutional reform project affecting its status and functions. No major reform of the Canadian federation may therefore be undertaken without Québec's consent and without its participation.

The demand for jurisdictions accompanies the demand for recognition. Québec governments have all maintained that Canadian federalism is too centralized in that it reserves exclusive general and unilateral powers for the federal government and does not give sufficient protection to the provinces' jurisdictions. The unitary federation of 1867 was decentralized thanks to the case law of the Privy Council in London, the highest court of the land from 1867 to 1949, which drew its inspiration from a classic dualistic concept of federalism to strengthen provincial autonomy and thus balance the text of 1867. After 1949, the Supreme Court of Canada took up where the Privy Council left off and began progressively to decompartmentalize the boundaries between jurisdictions and to broaden federal jurisdictions. Québec, no longer able to count on the balance of powers maintained by the courts, had to deal with a Canadian political environment favourable to the centralization of economic and social policies. On many occasions it contested the federal government's power to embark on these policies in Québec or to orient policies for which Québec itself had taken the initiative.

The demand for jurisdictions affected two aspects of the division of powers, integrity and coherence. First, Québec governments regularly urged the federal government to refrain from intervening in areas of jurisdiction the Constitution had already recognized as provincial. Whether it was education, health, municipal affairs or natural resources, they asked the federal government to withdraw by ceasing to incur expenditures or to legislate by indirect means. If the federal government intended to intervene in provincial jurisdictions, it should do so with their agreement and pay them subsidies with no conditions attached — or then grant them tax relief. Noting that the language of the Constitution of 1867 had aged, Québec governments called for its modernization to preserve the integrity of their

jurisdictions and thus clarify the division of governmental responsibilities.

Second, Québec governments also wanted to affirm the coherence of their jurisdictions. Some powers escaped the provinces because of the language of the Constitution and because of the progressive transfer of jurisdictions to the federal government by Supreme Court rulings, as in the area of communications[18]. It is difficult for a province to implement an integrated and effective social policy if, for example, it has jurisdiction over social security but cannot guarantee manpower training. The same holds true for culture, a vital matter for Québec. Québec has fragmented jurisdiction over culture because of exclusive federal jurisdiction over radio and television broadcasting[19] and now nearly exclusive jurisdiction over communications. This is why, in the view of Québec governments, reform of the division of powers came before any other reform. The issue was the coherence of the tools needed to offer integrated and comprehensive public policies to the population of Québec.

Finally, Québec governments, in addition to their demands for recognition and jurisdictions, were concerned with participation in federal institutions. The Canada of 1867 was distinguished and the Canada of the late twentieth century is still distinguished from most of the world's federations by the absence of certain institutional mechanisms for provincial participation in federal decisions. Even today the Canadian federal government in many ways resembles a unitary government more or less restricting its own actions. Hence the demand for participation by which Québec governments called for a voice in the appointment of high federal magistrates, Supreme Court judges, senators, senior public servants. In some cases, they went as far as demanding the exclusive right to make certain appointments, as Pierre-Marc Johnson's Parti Québécois government did for Québec superior court judges, judges who are appointed by the federal cabinet[20].

The confidence Québec governments have had in representative government should be underscored. Although they have respected courts and the rule of law, they have generally preferred to resolve their disputes with other governments in the country by intergovernmental channels rather than through the courts. Moreover, they have been reticent toward the idea of creating a new category of elected officials to represent the provinces in the central government, as the partisans in Canada of an elected Senate based on the American and Australian models wished. Québec governments have favoured a Senate on the German model, the Bundesrat, composed of delegates of the federated States. This preference was evident in the Charlottetown Constitutional Accord of 1992, which proposed establishing an elected Senate, among other things. At Québec's demand, the provinces were granted the power to determine how senators were to be elected[21].

2. Critical moments in constitutional reform from 1960 to 1982

There were thirteen constitutional conferences between 1927 and 1980 in addition to all of the more or less formal meetings where provincial and federal governments could discuss constitutional reform. In the absence of consensus and political will, few of these initiatives succeeded. From 1867 to 1960, the country's constitution underwent several limited changes. Some consisted of extending the jurisdictions of the federal parliament, particularly in matters of unemployment insurance, old-age pensions and federal power over central institutions.

It was mainly after 1960 that the Québec government's need to fully exercise its jurisdictions began to be felt. During the Liberal government of Jean Lesage (1960-1966), there was a question of

broadening Québec's tax base, extending its jurisdictions to the international scene and recovering the areas of provincial responsibility in which the federal government had interfered since World War II. In 1961, federal Justice Minister Davie Fulton proposed repatriating the constitution, without attaching an amending formula. Premier Jean Lesage rejected this proposal, for it gave the federal government too much power over changing central institutions. Another repatriation proposal came to light in October 1964. The Lesage government had to reject it in early 1966. Too rigid, the proposed amending formula gave Québec no recognition of its jurisdictions or sufficient guarantees for protecting its culture and language in return for its support.

Although the Liberal government exercised its veto over constitutional reform twice, it did manage to establish a separate pension system — the Régie des rentes du Québec — under Québec administration and it made agreements regarding the federal government's withdrawal from certain areas of provincial jurisdiction[22].

The Union Nationale government of Daniel Johnson (June 1966-September 1968) accentuated the national character of Québec's demands. It viewed the Canadian federation as the equal partnership of two linguistic and cultural communities, « two founding peoples, two societies, two nations in the sociological meaning of the term »[23]. The Johnson government demanded new jurisdictions, the only means of establishing this equality between Canada's two « cultural communities »[24]. It advocated a flexible formula for dividing responsibilities, enabling each province to bear those responsibilities it most needed. For Québec, it was important above all to strengthen its jurisdiction over human resources, culture, communications, social security and civil law, to confirm its international powers and to put an end to the federal government's unilateral powers which unbalanced the federation. Despite Québec's insistent demands, the intergovernmental conferences held from 1968 to 1971 did not lead to any agreement. The federal government and the provinces rejected the Québec government's binational concept of federalism and were not inclined to decentralize federalism.

The Johnson government was favourable to inserting a Québec Charter of Human Rights and Freedoms into Québec's internal constitution. It was not opposed to enshrining a Charter of Rights and Freedoms in the Canadian Constitution, provided that its interpretation was entrusted to a separate constitutional tribunal and not the Supreme Court of Canada. Knowing the federal government wished to enshrine a uniform charter of rights, it feared that the reform would translate into « the homogeneity of ethical visions » and not reflect Québec's « civil law traditions »[25].

During its short mandate (October 1968-April 1970), the Unionist government of Jean-Jacques Bertrand repeated its predecessor's demands, insisting on the necessity of decentralizing powers and making the mechanisms of delegation and cooperation between governments more flexible. Not opposed to enshrining a charter of rights, it nonetheless felt that this reform should come after a new division of powers.

The Liberal government of Robert Bourassa (May 1970-November 1976), while continuing to pursue the policy of its predecessors, emphasized Québec's cultural sovereignty. The premise of its policy was that Quebecers wanted to manage a government of their own that was capable of developing their cultural personality, and they wanted to participate in a bicultural federation respectful of Québec's distinct character[26]. It was therefore important to have the rest of Canada recognize the special responsibility of Québec's representative institutions with regard to « the permanence » and « development of French culture »[27]. The Bourassa government also sought a decentralized and more flexible federalism that would grant Québec adequate financial resources and consolidate its social and

cultural jurisdictions. It intended to gain control over health, social security and manpower policies and to exercise more jurisdiction over communications and immigration.

Favourable in principle to the adoption of a constitutional charter of human rights, it felt that this charter should not impede the adoption of a provincial charter of rights, nor modify the division of powers.

While the Bourassa government repeatedly emphasized Québec's cultural sovereignty, the federal government and the provinces, insensitive to Québec's many demands, gave priority to repatriating Canada's power to amend its constitution. Canada was not a fully sovereign country from the legal perspective, for the Parliament of Westminster reserved the power to amend the constitution of its former colony. Thus reforming the division of jurisdictions appeared to be a second-ranking priority, especially since the federal government, which claimed to be the country's only national government, felt it was necessary to centralize powers even more.

After seven meetings beginning in February 1968, the country's First Ministers agreed on a constitutional reform proposal in June 1971 in Victoria. It consisted of a charter of rights, a partial review of the division of jurisdictions, government commitments regarding regional inequalities and an amending procedure. Premier Bourassa, who had given his agreement in principle to the project, withdrew it a few days later. The Victoria project was far less than what Québec had hoped for in genuine constitutional reform. While the Bourassa government had demanded « priority responsibility in drawing up health, social services, income security and manpower policies »[28], the Victoria project broadened federal powers by adding to matters under competing jurisdictions, which reduced the sphere of jurisdictions reserved exclusively for the provinces. While the project granted Québec a constitutional veto, it also gave one to Ontario and to the Atlantic and Western regions. Some were concerned that these vetos would cancel one another out and make any future constitutional reform impossible. Moreover, the Bourassa government objected that the Victoria project gave the judiciary responsibility for clarifying an imprecise constitutional text, a task that is incumbent instead on the political power[29].

Constitutional reform broke off when the Victoria conference failed. The Bourassa government chose to concentrate its action on the pragmatic review of the federal system's operation in order to obtain the powers and resources needed to « preserve and develop the bicultural character of the Canadian federation »[30] from the federal government by administrative agreement.

With the election of the Parti Québécois in November 1976, Québec's constitutional priorities changed. For the first time in Québec's political history, Québec voters brought to power a party advocating Québec's accession to sovereignty. Concluding that Canadian federalism had failed because it could not renew itself and decentralize to meet the national aspirations of Quebecers, the government of René Lévesque saw Québec sovereignty combined with economic association with Canada as the means « of linking political autonomy with economic interdependence » and as « the contemporary expression of Québec continuity »[31]. The sovereignty-association project proposed Québec's acquisition of State sovereignty and maintaining Québec's relations with Canada through an international association modeled on the European Economic Community (EEC). This association would consist of an economic union and common currency.

The Lévesque government nevertheless continued to restate its predecessors' positions at intergovernmental conferences. It insisted on the recognition of the Québec-Canada duality and on the

necessity of looking anew at the division of powers before repatriating the constitution, which continued to be the federal government's priority. Aware of the inconveniences of judicial supervision of the constitutionality of laws, the Lévesque government objected to the insertion of linguistic rights into the country's constitution. This would have replaced Québec's autonomy with a « limited jurisdiction » subject to interpretation by the courts[32]. Like its predecessors, the Lévesque government preferred entrusting the protection of individual rights to a specialized constitutional court[33].

3. The unilateral repatriation of 1982: a loss of status and jurisdictions for Québec

On April 15, 1982, Queen Elizabeth II of England proclaimed the coming into force of the Constitution Act, 1982. For the partisans of a united and unitary Canada, it was a banner day. The Parliament of Westminster had just renounced what residual sovereignty it had over Canada. Fully sovereign at last, Canada endowed itself with a constitutional charter of rights, enshrined the collective rights of the Aboriginal peoples, made commitments with regard to regional inequalities, clarified the powers of provinces with respect to natural resources and acquired a formula for amending its new constitution.

It was not a day for rejoicing for Québec. A major reform of federalism was being carried out, a reform that excluded Québec and imposed a considerable loss of powers and status on it. Having long believed that Canada came into being through an agreement between two nations, Québec entered into a new system where its very existence as a nation, people or distinct society did not count. Subject to the principle of the formal equality of the provinces, it lost its historic right of veto over constitutional reform and found itself subject to the authority of language rights shaped by the courts, which narrowed the Québec National Assembly's jurisdiction over education and language.

After the failure of Victoria in 1971, the federal government tried in vain in 1976 and 1978 to take the initiative again to repatriate the constitution. The November 1976 election of a sovereignist party in Québec thwarted its plans. The May 1980 referendum on sovereignty-association, whose outcome was that 60% of the Québec electorate refused to give the Québec government the mandate to negotiate such a project, enabled the federal government of Pierre Elliott Trudeau to move ahead. During the 1980 referendum campaign, Prime Minister Trudeau promised Quebecers that their « no » to sovereignty-association would be interpreted as a willingness to renew federalism. Many Québec federalists believed that this promise would bring about recognition of Québec's distinctive or national character and greater autonomy.

In September 1980, the Trudeau government called a constitutional conference and announced that it intended to proceed with repatriating the country's constitution, even if it meant doing so without the provinces' approval. Several provinces, including Québec, were strongly opposed to this unilateral move which was contrary to the spirit of federalism, and they referred the matter to the courts. In a resounding decision, the Supreme Court ruled that this process, while legal within the letter of the law, infringed on a well-established political convention that a constitutional amendment needed substantial support from the provinces to be legitimate[34].

The Trudeau government called a new conference in November 1981. It succeeded in isolating Québec and negotiated a project of repatriation and the enshrinement of a charter of rights in the new constitution with the nine other provinces. Despite protests from Québec and its National Assembly, manifested by the adoption of a parliamentary resolution and an order in council in November 1981,

the federal government submitted its project to British authorities. It was approved by the Parliament of Westminster in March 1982.

a. Content of the 1982 reform

The 1982 reform was the most significant Canada had known since 1867. The Constitution Act, 1982 adopted by the British parliament introduced a Charter of Rights and Freedoms into the Canadian Constitution. Modeled on the American Bill of Rights, this charter entrusts the courts, notably the Supreme Court of Canada, with the explicit mandate of interpreting individual rights and, as the case may be, invalidating the laws of democratic assemblies deemed contrary to these rights. Even the Supreme Court of the United States does not enjoy such an explicit mandate, as Justice Claire l'Heureux-Dubé of the Supreme Court of Canada has pointed out[35]. The charter's language is general and abstract and of such a nature that it gives Canadian courts an enormous power of interpretation, raising the Supreme Court and the other courts of appeal of Canada to the rank of co-legislator and co-constituent[36]. One can with good reason think that the Supreme Court of Canada, by virtue of this implicit delegation of legislative power, has become one of the most powerful judiciaries in the Western world. In fact, the court, having inherited this new mission, continues to hear appeals in all fields, civil, criminal, administrative and intergovernmental.

Thus the 1982 reform replaced the principle of parliamentary sovereignty, the principle of English law that had governed Canada since 1867, by the supremacy of the Constitution and the courts. The charter of human rights includes an override clause called the « notwithstanding » clause which authorizes the country's eleven parliaments to restore their sovereignty for a maximum renewable period of five years. By adopting this clause, a parliament can exempt a law for this period from any challenge to its validity with regard to certain rights protected by the charter. But there is a high political price to exercising this override, for the parliament that avails itself of the override exposes itself to the censure of public opinion. Since 1982, few parliaments have restored their sovereignty in opposition to a Supreme Court decision invalidating one of their laws. In June 1982, just after the 1982 reform came into force, the National Assembly, by way of protesting against the unilateral repatriation, availed itself of the override power and passed a law that withdrew the body of Québec legislation from several of the rights sanctioned by the new federal charter[37]. This general override law is no longer in force.

The Constitution Act, 1982 also recognized collective rights for the Aboriginal peoples of Canada. It enshrines their « existing and treaty rights » without defining them and introduces a procedure permitting the automatic constitutionalization of agreements on territorial claims negotiated between governments and Aboriginal representatives.[38] Once again, it is incumbent on the courts to interpret an imprecise constitutional text. Unlike the charter's individual rights, these collective rights have an ethnic dimension, since the federal Indian Act reserved the title of Indian for members of tribes and bands of Indians and their descendents.

The charter of human rights also covers linguistic rights, expressed as individual rights. They confer on various categories of people the right to receive the public education provinces provide in English or in French, where the numbers so warrant. Yet again, the courts and not the parliaments are the final arbitrators of the meaning and exercise of these rights.

Finally, the Constitution Act, 1982 provides for a comprehensive amending procedure which gives the eleven legislative assemblies in the country, the federal parliament and the ten provincial legislatures, the power to amend the country's constitution. Depending on the area affected by the amendment, the unanimous consent of these assemblies is required, or the support of the federal parliament and seven provinces representing at least 50% of the population of all the provinces, or the consent of the federal parliament and the provinces affected by the amendment.

b. A loss of status and jurisdictions for Québec

The 1982 reform draws its inspiration from a centralizing vision of Canada difficult to reconcile with Québec's federative and binational vision. Far from recognizing Québec as a nation, people or distinct society, the 1982 reform is based on the principle that there is a single nation in Canada comprised of individuals enjoying equal constitutional rights from sea to sea[39]. The Supreme Court of Canada, guardian of these rights, seconds the federal parliament in defining uniform national standards which reduce the provinces' manoeuvring room[40].

Silent on Québec and the existence of a society with a French-speaking majority, the 1982 reform nonetheless takes exception to its individualistic logic by recognizing the Aboriginal peoples, holders of constitutionalized collective rights. Moreover, it raises multiculturalism to the rank of a rule of interpretation for the charter of rights. Promoted by the federal government since 1971 as a way of recognizing the contribution to Canadian society of immigrants of other than British or French ancestry, this concept was also a way for the federal government to counterbalance the biculturalism advocated by a federal royal commission of inquiry[41] and by Québec governments and intellectuals. It has been observed that the federal government's promotion of multiculturalism in Canada exempted it from « admitting the political consequences of Québec specificity » and « reduced the Québec fact to an ethnic phenomenon »[42]. According to political scientist Kenneth McRoberts, the concept of multiculturalism enabled the federal government « to overshadow the concept of two nations and to give it weapons to oppose Québec's demand for recognition of its distinct character based on culture. »[43]

The 1982 reform succeeded in overshadowing Québec's national character with the amending procedure, which is based on the principle of the equality of the provinces. In addition to losing its historic veto over constitutional reform, exercised in 1961 and 1966 by Jean Lesage and in 1971 by Robert Bourassa, Québec found itself enmeshed in the weighty amending mechanism which follows two principles. For matters relating to the use of official languages or to the constitutional monarchy, for example, the unanimity of the eleven parliaments is required. For other matters, the support of the federal parliament and seven provincial legislatures representing at least 50% of the population of all the provinces can open the way to constitutional reform. With this complex amending procedure, Québec saw its hopes for genuine reform of the division of powers dashed. The procedure does include mechanisms for withdrawal and limited financial compensation, enabling a province to preserve its acquired rights and escape from a reform the other members of the federation have decided on. The withdrawal mechanisms, which a province cannot invoke for the reform of federal institutions such as the Senate and the Supreme Court, are protective and not constructive.

This loss of status was accompanied by a reduction in Québec's legislative jurisdictions. Several

provisions on the rights of linguistic minorities were specifically written into the 1982 charter to impede Québec's language policy, as the Supreme Court itself notes in one of its judgments[44]. Section 23 of the charter prescribes the obligation the provinces have — Québec, in fact — to provide free public education in English, or in French, as the case may be, to residents who have already attended primary school in this language elsewhere in Canada. This prescription, called the Canada clause, brought an end to the Lévesque government's project of making public education in French the system common to all new arrivals. Another, more subtle prescription called the « universal clause » imposed the same obligation on the provinces but with regard to any immigrant whose learned language is English, or French, as the case may be. A special provision in the Constitution Act, 1982 suspended the effect of this prescription in Québec. Nevertheless, it will suffice that Québec approve it once for it to be applied irrevocably. The universal clause also carries a subtle symbolic message: the permission given Québec to integrate new arrivals into its French-speaking majority is presented as an infringement on constitutional rights tolerated by a kind of stay of proceedings. It would seem normal that the public school is French in France and German in Germany. In Canada since 1982, the French-language public school in Québec has been touched by the suspicion of illegitimacy through the play of legal language that refuses to recognize an autonomous political community in Québec.

Other constitutional guarantees in wording that is generous at first sight, such as freedom of expression, have revealed the reductive thrust of legislative power delegated to the Supreme Court of Canada and to other courts. In 1988, the Supreme Court ruled that the freedom of expression protected by the Canadian charter guaranteed commercial establishments the right to advertise in Québec in the language of their choice[45]. This broad interpretation of freedom of expression invalidated by the very fact the provisions in Québec's Charter of the French language that make French the only language of public commercial signs and posters. While the Court recognized the protection of the French language in Québec as a legitimate objective of government, it did not consider that this objective justified the prescription of unilingual French-language posting, remaining silent about the arguments Québec government lawyers put forward in support of their thesis.[46]

c. The 1982 reform ran counter to two basic principles of political legitimacy in a federation: consent and continuity

Québec and its National Assembly protested in vain against the unilateral reform of 1982. Voted by the Parliament of Westminster, then proclaimed by Queen Elizabeth II of England, it was sanctioned as the highest law of Canada. Québec's protests met with little sympathy in the rest of Canada, delighted to have acceded to normalcy by acquiring its full State sovereignty.

Although the 1982 reform was clothed in all of the attributes of formal legality, the manner in which it was undertaken seriously marred its legitimacy. First of all, it ran counter to one of the basic principles of federalism: the partners' consent to constitutional change. From 1867 on, Québec had participated in all attempts to reform the constitution, and none would have been brought into effect without its consent. The governments of Québec all shared the conviction of being representatives of one of the founding partners of the Canadian federation. For them, Canada's Constitution contained more than the highest law governing the workings of the State. It was a pact guaranteeing Québec its autonomy and a vital political space for its culture and civil institutions. The 1982 reform was far from reflecting this conviction which had been shared for a long time. It meant that Québec's consent was no longer necessary to validate Canada's constitutional changes. Further, unlike the time preceding the conclusion of the federative pact of 1867 when two nations, one the conqueror, the other aspiring to

recover its collective liberty, negotiated a formula of accommodation, the new Canada that emerged from the 1982 reform crystallized the vision of only one of the constituents of 1867. There is no other example in contemporary history of a free and democratic federation that has excluded one of its partners from a major reform of its institutions.

As the Leader of the Official Opposition in the National Assembly, Claude Ryan, observed in September 1981, a reform of federalism that reduced the rights of the National Assembly affected the people of Québec by that very fact:

> What is at stake is the defense of Québec's legislative powers, the defense of Québec's constitutional powers which are seriously threatened by the project the federal government is putting forward at the present time (...) We have to conclude that each time the National Assembly's basic prerogatives are attacked, it is the people of Québec who are attacked. To be indifferent to an attack on the National Assembly's powers is to be indifferent to or think lightly of the aspirations and the basic reality of the Québec people themselves.[47]

Attempts were made in Canada to minimize the impact of the unilateral nature of the 1982 reform. Its defenders insisted on the strictly legal aspect of the issue. The most frequently heard argument was the judgment on the existence of Québec's right of veto brought down by the Supreme Court. In this reference, the Court found that there was no political convention in the Canadian intergovernmental realm requiring Québec's consent to constitutional change[48].

The Court would have been hard pressed to find otherwise. Its decision came some eight months after the proclamation of the 1982 reform, once Great Britain had definitively renounced its residual sovereignty over Canada. If it had shed doubt on the validity of the process, the entire Canadian constitutional structure would have been shaken. Faced with this fait accompli, the Court had no choice but to sacrifice political legitimacy and the spirit of federalism for legal security. Moreover, by invalidating the 1982 reform, the Supreme Court would have had to renounce the court's expanded role as constitutional guardian of rights which the reform proposed.

In support of their legalistic conception, defenders of the 1982 reform also invoked an accord to which the Lévesque government had subscribed in April 1991. Signed by eight provincial premiers, the ad hoc accord consisted of a counterproposal to the constitutional repatriation project the federal government had put to the parliament a short time before.[49] While it implicitly recognized the constitutional equality of the provinces, this document provided for vetos and fully compensated rights to withdraw which, in the opinion of Québec negotiators, amounted to a de facto veto. It may be that these negotiators did not grasp the thrust of their gesture. But it would be surprising that a simple executive document that was valid only to the extent that the federal government accepted it and that was designed to convince the federal government to withdraw its project and renegotiate it with the provinces would be sufficient to revoke a political convention as fundamental as Québec's consent to a new federative order.

Another basic principle the 1982 reform ran counter to: continuity[50]. Under the Treaty of Paris signed at Versailles in 1763, France, at the end of the Seven Years War, ceded New France to Great Britain. The French population of New France then fell under the authority of English laws by proclamation of the King of England. It was a principle of English public law and of international law that a conquered people kept its customs and civil institutions. Great Britain recognized the value of this principle and

adopted the Québec Act in 1774, releasing French Catholic subjects in Québec from the obligation of swearing an oath of allegiance and recognizing their right to retain their French laws and customs in matters of property and civil law. Great Britain bent the rules of legal and political continuity guaranteed by the Québec Act by ordering the union of the colonies of Upper and Lower Canada in 1840. Nevertheless it re-established the primacy of the principle in the law that founded Canada in 1867. To preserve Québec's civil institutions, property and civil rights were made the exclusive jurisdiction of the provinces. Several civil institutions, schools, hospitals, municipalities came under exclusive provincial jurisdiction. Moreover, while the federal parliament was granted power to legislate on making uniform the civil law of « common law » provinces, Québec retained full jurisdiction over its civil law system.

The 1982 reform affected Québec's legal and political continuity on several accounts. It lowered Québec's status within Canadian federalism, subjected Québec's civil and political institutions to the supremacy of a constitution shaped by non-elected judges and reduced Québec's jurisdictions over education and language. The 1982 reform represented the second major discontinuity for Québec since the Québec Act of 1774.

4. After 1982: a diminished Québec seeking fair compensation

a. A first attempt at compensation: the Meech Lake Accord of 1987

Elected in 1984 on the promise of reintegrating Québec, with honour and enthusiasm, into the Canadian federal framework, the federal government of Brian Mulroney's Progressive Conservative Party showed several openings to the idea of a remedial reform. The government of René Lévesque, which was ending its second mandate, took the « beau risque » or « grand venture » of attempting to reform federalism and in May 1985 submitted a proposal for a constitutional accord that sought to « improve » it. The 1982 reform had wronged Québec greatly, the proposed accord noted : A federation cannot operate for the benefit of its citizens without the active participation of one of its major partners, just as Québec can never be satisfied with the diminished status imposed on it. We must seek an opportunity to remedy this situation[51]. By way of remedy, the proposed accord insisted on the constitutional recognition of the Québec people, the affirmation of Québec's preponderant jurisdiction over language rights and liberties, and the modernization and decentralization of powers.

Elected in December 1985, the Liberal government of Robert Bourassa took up its predecessor's torch in demanding fair compensation. Through the voice of its Minister for Intergovernmental Affairs, Gil Rémillard, it made known in May 1986 five prior conditions to Québec's support of the 1982 reform. The conditions were as follows:

- recognition of Québec as a distinct society;
- increased powers in the matter of selecting and integrating immigrants;
- Québec's participation in the appointment of Québec judges to the Supreme Court;
- restriction of federal spending power;
- recognition of Québec's right of veto over reform of the Constitution.

A final agreement was reached by the country's eleven First Ministers in June 1987. This agreement, which incorporated the Bourassa government's demands in a constitutional amendment project, was then to have been ratified by the country's eleven parliaments within three years.

Commonly called the Meech Lake Accord, the agreement was not intended to deal with all of Québec's demands. It served to make acceptable to Québec constitutional reform undertaken without its consent. Québec agreed to look at its demands again and postpone negotiations on several of them to another time[52]. The signatories to the Meech Lake Accord were convinced that once Québec was reintegrated into the federative framework, the federation would begin functioning again. They could then proceed in a normal fashion to review the institutional reforms Canada needed so badly: reform of the Senate and the Supreme Court, division of government powers and so on.

The Meech Lake Accord was to have recognized Québec as a distinct society in the Canadian Constitution. The Québec government and legislature also saw in it the recognition of the role of protecting and promoting Québec's distinct character. By the same token, the governments and legislative assemblies of the country saw themselves with the role of protecting Canada's linguistic duality. These two concepts, the distinct society and linguistic duality, had the rank of clauses serving to interpret the Constitution of Canada. The accord included a procedure giving constitutional protection to agreements on immigration negotiated between the federal government and the provinces. It also provided a framework for what Canadian constitutional jargon calls federal spending power. The Canadian federal government has an enormous fiscal capacity; by using its subsidies and transfers, it can intervene in sectors of activity under provincial jurisdiction and alter priorities, notably by tying conditions to these subsidies, as it has done with health[53]. In brief, this spending power is a form of indirect legislative power added to the array of federal powers. The Meech Lake Accord would have limited the future exercise of this prescriptive power. It would have recognized the provinces' right to withdraw from programs financed by the two orders of government and to receive fair financial compensation from the federal government in return.

Then the provinces would have obtained a veto over several aspects of constitutional reform, notably with regard to the proportional representation of the provinces in the federal parliament, to the power of the Senate and the selection of senators, to the appointment of Supreme Court judges, etc. They would also have obtained the right to withdraw, with fair financial compensation, from any constitutional amendment transferring legislative jurisdictions to the federal parliament.

Finally, in addition to sanctioning the guarantee made to Québec to be represented by three of the nine judges on the Supreme Court bench, the Accord had the provinces participating in the appointment of Supreme Court judges and senators.

The Meech Lake Accord met with growing opposition in Canadian public opinion. This was apparent in the fact that some provinces were in no hurry to ratify it[54]. Opposition arose, among other things, from the fear that the accord would grant Québec special status by its recognition as a distinct society and would water down the primacy of individual and collective rights sanctioned by the 1982 charter. Two provinces where there was strong opposition to the accord, Manitoba and New Brunswick, delayed ratification; another province, Newfoundland, withdrew its support. The failure of the legislatures of Manitoba and Newfoundland to give effect to the accord rendered it null and void. Following the failure of this first attempt at constitutional remediation, the Québec government withdraw from the forum of intergovernmental and constitutional discussions, deeming the process discredited.

b. A second attempt: the Charlottetown Accord of 1992

In June 1990, Premier Bourassa, with the agreement of Leader of the Opposition Jacques Parizeau, mandated a special parliamentary commission, the Bélanger-Campeau Commission, to consult the population of Québec and define Québec's political options. The report tabled in March 1991 concluded Québec had two political options: accession to sovereignty or negotiating with Canada a new partnership within the federal framework. At the same time, a federal commission of inquiry chaired by Keith Spicer sounded out Canadian public opinion, hoping to give rise to a consensus on common values. It submitted its report in June 1991 after numerous setbacks.[55] In September 1991, the Mulroney government took the constitutional reform initiative again, tabled a reform project, Shaping Canada's Future Together[56], and then mandated a special joint House of Commons and Senate committee, the Beaudoin-Dobbie Committee, to study the project and improve it.[57]

In the winter of 1992, negotiations on drawing up a Canadian offer got underway between the federal government and the provinces, with the exception of Québec, which chose to abstain. It was no longer a question of responding to Québec's demands only. Everything was put on the table: Senate reform, economic and social union, Aboriginal government, the division of powers, etc. The Québec government ended up going to the negotiating table in extremis. The eleven First Ministers and Aboriginal representatives reached a final accord in August 1992 in Charlottetown. Two referendums, one federal, held outside Québec, the other held in Québec under the authority of Québec laws, decided the fate of the accord. The two referendums of October 1992 confirmed that 55% of the Canadian population and nearly 57% of the Québec population rejected the accord.

Although the negotiations preceding the Charlottetown Accord had turned into a « Canada round », they started from the principle that it was necessary to reintegrate Québec into the constitutional framework and thus satisfy the conditions it had laid down for agreeing to the 1982 reform. The Charlottetown Accord differed from the Meech Lake Accord in that in addition to wishing to redress the wrongs the 1982 reform did to Québec, it proposed a fundamental reform of federation for all of Canada. Thus in addition to recognizing Québec's distinct character and entrusting its promotion to the Québec government and legislature, the accord enshrined multiculturalism, the equality of the provinces and the sexes, etc. as fundamental values of the country. It instituted a third order of Aboriginal government, whose creation was left to court arbitration, created a Senate in which the provinces would be equally represented, and restructured government responsibilities by constitutional amendment or by means of constitutionalized government agreements.

The two referendums brought an end to this second attempt at remediation. If the governments of Canada and of Québec invested so much energy in the reform of the Constitution over a decade, it was because they recognized a wrong that mortgaged Canada's future in the unilateral imposition of the 1982 reform on Québec. This injustice within the Canadian constitutional order called for nothing less than constitutional remediation.

C. The political situation of Québec following the October 30, 1995 referendum

This brief overview of constitutional reform in Canada enables us to better understand the issue and

why Canadian federalism has given rise to discontent in Québec. Québec's most fundamental demand has been based on its desire to live in a political system where the language and structure of representative institutions are in accord with its will to establish itself as a political community. Whence the importance attached to the issue of recognizing Québec's status as a self-governing political community, as a « society distinct by its language, culture and institutions » « that has all the attributes of a distinct national community. »[58]

The Canadian federation has certainly been modernized since 1867. The political system that has emerged scarcely resembles the nearly unitary government its constituents agreed to. Jurisdictions have been transformed and made more flexible; governments have developed consultation and delegation mechanisms, enabling them to reorganize the division of some of their responsibilities and coordinate their activities. But despite this unquestionable evolution, Canada has remained a unitary federation in its official discourse and its constitutional architecture, making the central government the primary and most representative authority. The 1982 reform underscored the unitary vocation of this federation. It sanctioned a uniform concept of citizenship defined by adherence to a national Charter of Rights and Freedoms, of which the Supreme Court of Canada, powerful and legislating, is the recognized guardian[59]. If this federalism recognized linguistic duality in federal institutions and guaranteed linguistic minorities certain rights, it fit this duality into a unifying cosmopolitanism — multiculturalism —, a controversial policy that it has been suggested may, in fact, foster the breakdown of the civic bond[60]. This federation, despite its leaders' often stated willingness to change both its functioning and its symbols, has found it difficult and has been somewhat reluctant to recognize Québec as anything more than a territorial community administered by a local government.

This is what the Toronto daily The Globe and Mail noted. Rather than responding to the aspirations of a modern Québec born of the Quiet Revolution, Canada has deemed it advisable to diminish Québec's status and powers:

> The real truth is that Canada failed to respond adequately to Quebec's Quiet Revolution at the level of society itself. (...) The sum total of Canada's response to Quebec itself after the 1980 referendum was an imposed reduction of Quebec's legislative discretion through the 1982 Charter of Rights, and the formal abolition of Quebec's previously assumed right of veto over major constitutional changes.[61]

Canada's difficulty in remedying the wrongs the 1982 reform did to Québec has not escaped foreign observers either. The New York Times devoted an editorial to the political situation in Québec during the referendum campaign of October 1995 and drew these conclusions:

> Quebecers have a genuine grievance — a sharp loss of constitutional status over the past decade and a half — that has never been satisfactorily resolved. Canada was shaped by the 18th-century conquest and absorption of the French colony of Quebec into the British Empire. British rule recognized the special linguistic and cultural status of Quebec, and the province carried a weight in independent Canada's affairs well beyond its 25 percent of the country's population.
>
> But when Canada established a fully sovereign Constitution in 1982, Quebec's legal status reverted to being just one of ten Canadian provinces. Agreements promoted by Ottawa since then to legally enshrine a special status for Quebec have been repeatedly rejected by English-speaking Canada.[62]

The 1982 reform embraced a new Canadian social contract under which federalism yielded its preponderence to a new political culture based on individualism and the patriotism of rights. That Canada came into being by a compromise between two nations ceased to be part of the country's constitututional perspective. Québec governments have nevertheless maintained their attachment to federalism as the organizing principle of the Constitution, and even after 1982, some of them, like the governments of Pierre-Marc Johnson and Robert Bourassa, hoped to restore the real strength of this principle.

Québec governments have opposed the 1982 reform not because of their hostility to individual rights but because of the manner in which this reform was brought in and the means chosen to protect these rights. Québec was already a society devoted to the idea of rights before 1982. A long legal tradition, the outcome of the rapprochement between the civil law of French tradition and the common law of English tradition, had implanted the love of liberty and law in Québec's mores. In 1975, the National Assembly adopted the Charter of Human Rights and Freedoms, a forward-looking law in many respects that made the protection of human rights one of the Québec lawmaker's paramount concerns. Thus when the federal government manifested its willingness to constitutionalize its charter of rights, the government of Québec did not protest against the pre-eminence these rights were granted. All in all, Québec governments would have been more inclined to entrust the application of a charter of rights to a constitutional court of the European kind rather than to a general court of appeal like the Supreme Court of Canada. They have also insisted on the necessity of conciliating the primacy of rights with federalism. This conciliation could have taken several forms. Entrenching an interpretive clause in the federal charter of 1982, as the Bourassa government proposed, recognizing Québec as a distinct society. Affirming, as the government of Pierre-Marc Johnson advocated, the preponderance of the Charter of Human Rights and Freedoms Québec had already adopted in 1975 over the federal charter.

It can be alleged that Québec lost very little with the 1982 reform. Grievous as its methods were, its aims were excellent: to give human rights the full recognition that is their due in a modern and democratic country. What Québec would have lost by this reform was well worth the powers that any democratic government subject to the rule of law and liberties should, in any case, renounce. It must be acknowledged that if the idea of rights is one of the great philosophic ambitions of our time, there are several ways of protecting these rights, and none is absolute. To choose as Canada did in 1982 to endow the courts with political powers of an unprecedented scope was certainly not the only way of enshrining human rights. Several observers of Canadian political life think, with law professor Michael Mandel, that the judicial control the 1982 reform set up weakened Canadian democracy by paring down the power of the peoples of Québec and Canada for the benefit of powerful interests and of judges appointed for life by the federal cabinet[63].

Québec governments have often insisted on decentralizing the division of powers. Inspired by a « subsidiary » concept of federalism, they consider themselves the primary holders of government responsibilities for whatever may involve culture, education, human and natural resources and basic public services such as health care. The principle of « subsidiarity », which inspired German public law and the construction of the European Union and which has been evident in the Union's treaties since Maastrich, has also implicitly shaped the thinking of Québec governments[64], which have felt the federal government should play an auxiliary role and refrain from doing for Québec what Québec could do alone, or in cooperation with the other provinces. This subsidiary concept of responsibilities has often run up against the unequal division of legislative powers and fiscal means since 1867 and the federal government's affirmed will after World War II to domineer the provinces' social

responsibilities through its spending power and by enacting national standards. By the same token, Canadian society's disinterest in committing itself to sustained decentralization or to granting Québec any special status whatsoever has not been propitious to reforming the division of jurisdictions, whether guided by the principle of subsidiarity or the principles of integrity and coherence that underlie Québec's demands.

The close outcome of the October 1995 referendum, like the ups and downs of Canadian federalism since 1867, revealed two competing societal blueprints or projects[65], each using the resources of democracy to define itself. Contrary to what has been said in a polemical tone[66], Quebecers' project of belonging to a political community of their own does not stem from an ethnic vision of the nation. According to political scientist Simon Langlois, Québec « has little by little become a comprehensive society with a body of specific institutions, its own social organization and culture, national objectives and different policies, which make it much more a country than a province, (...) a civil society than an ethnic group. »[67] In fact, it suffices to look at how Québec has restructured itself since 1960 to see it as a modern political community, attached to parliamentarianism[68] and the law, concerned with introducing the principle of fair play and a plurality of ideas into political life. Québec, like most Western societies, has had the ambition of achieving a certain social justice through State-administered redistribution and regulation while offering citizens the means and guarantees of autonomy. Through its policies on language and the integration of immigrants, it has tried to forge a common citizenship and sense of belonging in Québec, the French language opening the door to work and the democratic life.

In the aftermath of the October 30 referendum, it is difficult to predict whether Canada will eventually remedy the loss of status and powers imposed on Québec in 1982 or if Quebecers, in a third referendum on sovereignty, will decide in the majority to take their place among the sovereign nations. Quebecers have been debating Québec sovereignty and the renewal of the Canadian federation for over thirty years. Experienced political parties that hold to the practices of parliamentary democracy have defended both theses with conviction and governed Québec in turn. If the 1995 referendum revealed a people divided as to its political status, it nonetheless crystallized even more clearly than the May 1980 referendum the general conviction that it is up to the population of Québec, by way of referendum or through elections, to decide on its future under the laws of its National Assembly.

This conviction is the natural outcome of Quebecers' attachment to their representative institutions. Québec is a democracy over two hundred years old, prepared to have the people vote on major issues and engage in discussion and debate. Quebecers have exercised their right to decide freely on their political future three times, in May 1980, October 1992 and October 1995, and they have done so with order and relative serenity. Each of these referendums was held within the framework of a rigorous law[69] that ensures a balance of opportunities and expenditures between the opposing sides. Holding these referendums within such a rigorous framework demonstrates the willingness of Québec governments, whatever their political stripe, to link Québec's status to the will of the people, in brief, to have national aspirations and democracy move forward together. Although the referendums have prompted some strong reactions, the federal government has recognized the legitimacy of these democratic exercises and several of its representatives have said they were prepared to accept the people's verdict.[70] The sovereignist parties — the Parti Québécois and the Bloc Québécois, which forms the Official Opposition in the federal parliament — are not alone in demanding Quebecers' right to self-determination. In 1992, the Liberal government of Robert Bourassa induced the federal government to organize its own referendum, under its own legislation, on the constitutional reform proposal negotiated at Charlottetown. The Bourassa government had already made several

declarations on the right of the people of Québec to decide on their future.[71]

Seen from afar, Québec's national question may seem somewhat complicated, the expression of the special concern of a small population dissatisfied with the terms of its inclusion in a prosperous and modern federation. But seen from closer up, the issue is that of a young society beset with all of the major problems the globalization of the economy, the breakdown of borders between countries and peoples, and the rise of regionalisms and movements of identity pose for most democratic countries today. These problems — how to conciliate nationalism and democracy, political autonomy and economic interdependence, liberalism and social pluralism — confront Quebecers day after day, which may explain why they are so hesitant about their political future. If the foreign observer looks closely at how this minority people has affirmed itself as an open and pluralistic society in a unitary federation, he or she, too, might hesitate: Canadian federalism will serve as a model, to be or not to be followed.

Notes

11. Jean Dion, « Chrétien annonce ses »changements« », Le Devoir, November 28, 1995; « Un hochet symbolique, » Le Soleil, November 28, 1995; Joel-Denis Bellavance, « Une coquille vide pour le Bloc, » Le Soleil, November 28, 1995; Lise Bissonnette, « La mesure du changement, » Le Devoir, November 28, 1995; Donald Charette, « Les Québécois majoritairement contre les propositions Chrétien, » Le Soleil, December 8, 1995.

12. Two documents outline these demands. Gouvernement du Québec, Ministère des Affaires intergouvernementales du Québec, Les positions traditionnelles du Québec sur le partage des pouvoirs (1900-1976), 1978. Gouvernement du Québec, Secrétariat aux affaires intergouvernementales canadiennes, Les positions traditionnelles du Québec en matière constitutionnelle, 1936-1990, 1991.

13. Carl J. Friedrich describes the Canadian State as a « unitary federal state. » See Carl J. Friedrich, Trends of Federalism in Theory and Practice (New York: Frederick A. Praeger, 1968, 193 pages).

14. See Denis Vaugeois, Québec 1792. Les acteurs, les institutions et les frontières (Montréal: Fides, 1992, 172 pages).

15. See the ninety-two resolutions of the legislative assembly of Lower Canada (1834) in Jacques-Yvan Morin and José Woehrling, Les constitutions du Canada et du Québec du régime français à nos jours, vol. 2. (Montréal: Les éditions Thémis, 1994, 336 pages).

16. Margaret Conrad, Alvin Finkel, Cornelius Jaenen, History of the Canadian Peoples, Beginning to 1867, vol. 1 (Toronto: Copp Clark Pitman Ltd., 1993, 631 pages).

17. See Jacques-Yvan Morin and José Woehrling, Les constitutions du Canada et du Québec du régime français à nos jours, vol. 1. (Montréal: Les éditions Thémis, 1994, 656 pages).

18. Craig Brown (dir.), Histoire générale du Canada (Montréal: Éditions du Boréal, 1988, 694 pages).

19. See the Act to repeal so much of the Act of 1840 as relates to the Use of the English Language in Instrument relating to Legislative Council and Legislative Assembly of the Province of Canada in Morin and Woehrling, Les constitutions du Canada et du Québec du régime français à nos jours, vol. 2, op cit 5.

10. Gil Rémillard, Le fédéralisme canadien, vol. 1. (Montréal: Québec/Amérique, 1983, 734 pages), to page 139.

11. On these two classic principles of federalism, autonomy and participation, see Stéphane Rials, Destin du fédéralisme (Paris: Librairie de droit et de jurisprudence, 1986). Also see Maurice Croisat, Le fédéralisme dans les démocraties contemporaines (Paris: Montchrétien, 1992, 158 pages).

12. See Gil Rémillard, op cit, p. 171.

13. In federal systems, this power is usually attributed to federated states, as is the case in the United States, Switzerland, Germany and Australia.

14. See Morin and Woehrling, vol. 1, op cit 7, p. 153.

15. See Peter W. Hogg, Constitutional Law of Canada (Toronto: Carswell, 1992, 1478 pages).

16. See Hollery, « The Politics of Constitutional Change » in Paul Davenport and Richard H. Leach (dir.), Reshaping Confederation. The 1982 Reform of the Canadian Constitution (Durham, North Carolina: Duke University Press, 1982, 329 pages).

17. See Edward McWhinney, Québec and the Constitution 1960-1978 (Toronto: University of Toronto Press, 1979); Alain G. Gagnon and Joseph Garcea, « Québec and the pursuit of special status » in R.D. Olling and M.W. Westmacott (dir.), Perspectives on Canadian Federalism (Scarborough, Ontario: Prentice-Hall Canada, 1988), p.304; André Bernard, « Les revendications traditionnelles du Québec » in Claude Bariteau (dir.) et al, Référendum, 26 octobre 1992: les objections de 20 spécialistes aux offres fédérales (Montréal: Éditions Saint-Martin, 1992), pp. 11-17; André Tremblay, La réforme de la constitution du Canada (Montréal: Les éditions Thémis, 1995), p. 105-138.

18. See the following judgments in particular: Capital Cities Communications Inc. v. C.R.T.C., (1978) 2 S.C.R. 141; Public Service Board v. Dionne, (1978) 2 S.C.R. 191; Bell Canada v. Canada (CRTC), (1989) 1 S.C.R. 1722; Alberta Government Telephones v. C.R.T.C., (1989) 2 S.C.R. 225; Téléphone Guèvremont Inc. v. Quebec (Régie des Télécommunications), (1994) 1 S.C.R. 878.

19. In re Regulation and Control of Radio Communication in Canada, (1932) A.C. 304.

20. Gouvernement du Québec, Projet d'accord constitutionnel — Propositions du gouvernement du Québec (Québec City, 1985).

21. Robert Bourassa's party had already drawn up a Senate project based on the German model. See the Commission constitutionnelle du parti libéral du Québec, Une nouvelle fédération canadienne (Montréal: Parti libéral du Québec, 1980).

22. See André Tremblay, op cit 17, p. 93.

23. « Opening Address » by Daniel Johnson, Federal-Provincial Conference, Ottawa, February 5-7, in Le gouvernement du Québec et la constitution, 1968, Office d'information et de publicité du Québec, p. 63, cited in Les positions traditionnelles du Québec en matière constitutionnelle 1936-1990, op. cit. 2.

24. Daniel Johnson, Égalité ou indépendance, 25 ans plus tard (Montréal: VLB éditeur, 1990).

25. See Les positions traditionnelles du Québec en matière constitutionnelle 1936-1990, op cit, par. 83.

26. Ibid., par. 118.

27. Ibid., par. 119.

28. Ibid., par. 133.

29. Statement by Robert Bourassa, Journal des débats, June 23, 1971, p. 2738.

30. Cited in Alain-G. Gagnon, « Québec-Canada: circonvolutions constitutionnelles, » in Alain-G. Gagnon (dir.), Québec: État et société (Montréal: Éditions Québec-Amérique, 1994), p. 89.

31. Gouvernement du Québec, Québec-Canada: A New Deal: The Québec Government Proposal for a New Partnership Between Equals, Sovereignty-Association (Éditeur officiel du Québec, 1979, 109 pages).

32. Les positions traditionnelles du Québec en matière constitutionnelle 1936-1990, op cit 2, par. 199 and 200.

33. Ibid., par. 202.

34. Re: Resolution to amend the Constitution, (1981) 1 S.C.R. 753.

35. Claire L'Heureux-Dubé, « Two Supreme Courts: A Study in Contrast, » in Marian C. McKenna (dir.), The Canadian & American Constitutions in Comparative Perspective (Calgary, Alberta: University of Calgary Press, 1993), p. 149-165.

36. See Andrée Lajoie, « Schacter, ou la retenue judiciaire comme antithèse de la neutralité » in Droits de la personne: l'émergence de droits nouveaux, Actes des Journées strasbourgeoises de l'Institut canadien d'études juridiques supérieures, 1992, p. 525-544; by the same author, « Le ripercussioni della Carta dei diritti e delle libertà sui rapporti tra i tribunali et il Parlamento, » Quaderni costituzionali, 15 (1995), p. 167-193; Karim Benyekhlef, « Démocratie et libertés: quelques propos sur le contrôle de constitutionnalité et l'hétéronomie du droit, » (1993) 38 R.D. McGill 91; Dale Gibson, « Judges as legislators: not whether but how, » (1987) 25 Alta. L.R. 249.

37. Act respecting the Constitution Act, 1982, S.Q. 1982, c. 21, sanctioned June 23, 1982.

38. This procedure was introduced in 1983 according to the terms of the first change to the Constitution since 1982. Constitutional Amendment Proclamation, 1983. (SI/84-102).

39. See Guy Laforest, « L'esprit de 1982 » in L. Balthazar, G. Laforest, V. Lemieux (dir.), Le Québec et la restructuration du Canada, 1980-1992. Enjeux et perspectives (Sillery, Québec: Les éditions du Septentrion, 1991), p. 149-163.

40. See Peter H. Russell, « The political purposes of the Canadian Charter of Rights and Freedoms, » (1983), 61 Can. Bar Rev. 30.

41. Royal Commission on Bilingualism and Biculturalism (Ottawa: The Queen's Printer, 1965 and 1967).

42. Christian Dufour, Le défi québécois (Montréal: L'hexagone, 1989, 176 pages), p. 77.

43. Kenneth McRoberts, « Dans l'oeil du castor », Possibles, 1992, 16, pp.35-48, p. 41.

44. A.G. (Que.) v. Quebec Protestant School Boards, (1984) 2 S.C.R. 66.

45. Ford v. Québec (P.G.), (1988) 2 S.C.R. 712.

46. Michael Mandel, La Charte des droits et libertés et la judiciarisation du politique au Canada (Montréal: Éditions du Boréal, 1996, 383 pages), pp.242-244.

47. Le Journal des débats, XXV(1), September 30, 1981, p. 23.

48. Re: Objection to a resolution to amend the Constitution, (1982) 2 S.C.R. 793.

49. See Claude Morin, Lendemains piégés. Du référendum à la nuit des longs couteaux (Montréal: Éditions du Boréal, 1998, 394 pages), p. 236 and ff.

50. See James Tully, « Le fédéralisme à voies multiples et la charte, » in Alain-G. Gagnon, Québec: État et société, op cit 30.

51. Op cit.

52. Gil Rémillard, Minister for Canadian Intergovernmental Affairs, « L'Accord constitutionnel du 1987 et le rapatriement du Québec au sein du fédéralisme canadien, » in L'adhésion du Québec à l'Accord du Lac Meech. Points de vue juridiques et politiques (Montréal: Les éditions Thémis, 1987), p. 206.

53. Canada Health Act, R.S.C. 1985, c. C-6.

54. Numerous works have attempted to explain the reasons for this failure. See among others Raymond Breton, Why Meech Failed: Lessons for Canadian Constitution-Making. Observation No. 35, C.D. Howe Institute, 1992, 84 pages; Alain C. Cairns, Disruptions: constitutional struggles from the Charter to Meech Lake (Toronto: The Canadian Publishers, 1991, 307 pages); Patrick J. Monahan, Meech Lake: The Inside Story (Toronto: The University of Toronto Press, 1991, 340

pages); Pierre Fournier, Autopsie du Lac Meech. La souveraineté est-elle inévitable? (Montréal: VLB éditeur, 1990, 214 pages).

55. Citizens' Forum on Canada's Future, Report to the people and government of Canada, June 27, 1991, 188 pages.

56. Department of Supply and Services, Government of Canada, 1991.

57. See A Renewed Canada, Report of the Special Joint Committee of the Senate and the House of Commons, February 28, 1992, 203 pages.

58. Text of a resolution the National Assembly adopted to protest the unilateral repatriation of November 1981. See Jacques-Yvan Morin and José Wochrling, op cit 7, p.424.

59. The Supreme Court of Canada has publicly recognized that it now exercises a legislative function under the Charter, a function Chief Justice Antonio Lamer has called « judicial legislation ». Antonio Lamer, « Canada's legal revolution: judging in the age of the charter of rights, » (1994), 28 Israel Law Review 579.

60. Neil Bissoondath, Selling Illusions: the Cult of Multiculturalism in Canada (Toronto: Penguin Books, 1994, 234 pages). The French version is entitled Le marché aux illusions: la méprise de multiculturalisme (Montréal: Éditions du Boréal, Leber, 1995, 242 pages).

61. « Mayday on Flag Day, » The Globe and Mail, February 17, 1996.

62. « Drastic Remedies in Quebec, » The New York Times, October 30, 1995.

63. Michael Mandel, La Charte des droits et libertés et la judiciarisation du politique au Canada, op. cit. 46. The English version is entitled The Charter of Rights and the Legalization of Politics in Canada (Thompson Educational Publishing Inc., 1994).

64. Premier Bourassa called openly for this. See « Le premier ministre du Québec répond à nos questions, » Bulletin de la Société de droit international économique, vol. 4 n.2, spring-summer 1991, p.14. Also see the influence this concept has had on Québec political thought in Marc Chevrier, « La conception pluraliste et subsidiaire de l'État dans le rapport Tremblay de 1956: entre l'utopie et la clairvoyance, » Les cahiers d'histoire du Québec au XXe siècle, no.2, summer 1994, p. 45.

65. Simon Langlois, « Le choc de deux sociétés globales » in Le Québec et la restructuration du Canada, 1980-1992. Enjeux et perspectives, op cit 39.

66. See, for example, Max Nemni's text on Québec nationalism, « The Case against Quebec Nationalism, » The American Review of Canadian Studies, summer 1994, p. 171.

67. « Le choc de deux sociétés globales, » op cit 63, p. 102-105.

68. Marc Chevrier, « Le Canada, le Québec et l'avenir de la démocratie parlementaire, » L'Agora, November 1995, p. 9.

69. Referendum Act, R.S.Q., c. 64-1.

70. See José Woehrling, « Les aspects juridiques et politiques d'une éventuelle accession du Québec à la souveraineté », in L'accession du Québec à la souveraineté : aspects juridiques, Montréal, Institut de recherche en politiques publiques, « Québec-Canada », June 1995, no. 12, p. 25-44, particularly p.32, note 20.

71. See Robert Bourassa's statement: « Québec is now and will always be a distinct society, free and capable of assuming its destiny », in « Le Québec est libre et capable d'assumer son destin, dit Bourassa » by Bernard Descôteaux, Le Devoir, June 23, 1990, and Gil Rémillard's statement to the National Assembly, Journal des débats, XXX(1), September 4, 1990, p. 4331-4334. Also see the preamble to the Act establishing the Commission on the political and constitutional future of Québec, S.Q., 1990, c. 34., and the statement of Claude Ryan, Leader of the Official Opposition, Journal des débats, XXVI(1), November 24, 1981, p. 370.

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